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Supreme Court, U.S.
FILED
FEB 17 2005
OFFICE OF THE CLERK

No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Federal Tort Claims Act (FTCA), the United States has waived its sovereign immunity to be sued in tort, but only to the extent that "the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). Thus, subject to additional restrictions contained in the FTCA itself, the United States' liability is defined solely by reference to the duties imposed by state law on private persons, and the United States may be held liable only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

As we demonstrate in the certiorari petition, the decision below recasts this central feature of the FTCA in a manner that cannot be reconciled with the text of the statute, this Court's decisions, or the decisions of other courts of appeals. The court of appeals held that the United States may be held liable by reference to the liability imposed on state govern-

mental entities, regardless of whether state law would place any actionable duty on private individuals in like circumstances. Pet. App. 5a-6a. The court of appeals reasoned that because Arizona has decided to make state governmental entities liable for its employees' violations of state law, the United States should, by analogy, be liable for its employees' breaches of federal law. *Id.* at 6a-7a.

Respondents make no attempt to reconcile the Ninth Circuit's decision with the text of the FTCA. Respondents seek instead to minimize the conflict between the Ninth Circuit's decision and the decisions of this Court and other courts of appeals. Br. in Opp. 6-15. Respondents acknowledge (*id.* at 7-8) that this Court has long made clear that the United States may be held liable when state law imposes liability on a private person, even if state law would not impose liability on a governmental actor. See Pet. 10-11. They also recognize (Br. in Opp. 11-13, 14) that other courts of appeals have followed those holdings in the precise context of mine inspections by the Mine Safety and Health Administration (MSHA), as well as in the context of other inspections performed by federal agencies. See Pet. 14-16, 17-18. In respondents' view, however, the ruling below can be reconciled with those other decisions because it makes the United States liable, even if state law would impose *no* liability on a private person, as long as "state law would make a state or municipal employee liable under like circumstances." Br. in Opp. 1 (emphasis omitted). That is plainly not a basis for reconciling the conflict. Neither this Court nor the other courts of appeals have suggested that the FTCA makes the United States liable in tort under *either* the liability imposed on a private individual *or* the liability imposed on a state governmental entity, as long as the route to maximum liability is selected. Such a view is irreconcilable with this Court's express recognition that the FTCA "waives the immunity of

the United States and that * * * [the Court] should not take it upon [itself] to extend the waiver beyond that which Congress intended." *Smith* v. *United States*, 507 U.S. 197, 203 (1993) (internal quotation marks omitted).

The Ninth Circuit's ruling is without any anchor in the text or purposes of the FTCA, and it visits on the United States liabilities never consented to by Congress. The decision warrants this Court's review.

A. The Decision Below Is Contrary To The Explicit Text Of The Federal Tort Claims Act And This Court's Decisions

Respondents recognize (Br. in Opp. 7-8) that this Court has already construed the FTCA provisions that subject the United States to liability based on state law duties imposed on private persons in like circumstances. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957). Respondents assert that those decisions are fully consistent with the holding below that the United States may be subject to liability even if state law imposes *no* liability on private persons. See, *e.g.*, Br. in Opp. 6. That contention is implausible on its face and finds no support in this Court's decisions.

In *Indian Towing*, the Court specifically rejected the argument that the FTCA imposed liability on the United States "in the same manner as if it were a municipal corporation and not as if it were a private person." 350 U.S. at 65. The Court reasoned that the FTCA did not "covertly embed[]" into the FTCA "the casuistries of municipal liability for torts." *Ibid.* While in *Indian Towing*, application of the state law applicable to governmental entities would have rendered the United States immune from suit, the Court's rejection of such a rule was not based upon that result or any principle of maximizing the liability of the United States: it was based on the text of the FTCA. See *id.* at 64-65. The Court made clear

that the incorporation of governmental liability principles was "unsatisfactory" regardless of whether the outcome under a particular state's law of governmental liability would be immunity for the United States or a judgment of liability against the United States. See *id.* at 65 & n.1.

Similarly, *Rayonier*'s holding that the United States could be liable for the negligence of its firefighters was based upon the text of the FTCA, not upon a preference for rules of law that would maximize the government's liability. See 352 U.S. at 318 (noting that the "plain natural meaning" of 28 U.S.C. 1346(b) and 2674 "make[s] the United States liable to petitioners * * * if * * * Washington law would impose liability on private persons or corporations under similar circumstances"). The Ninth Circuit's embrace of a rule designed to maximize the liability of the United States would be irreconcilable with this Court's recognition that the FTCA establishes the limits of the United States' waiver of sovereign immunity—limits that must not be extended beyond the bounds established by Congress. See *Smith*, 507 U.S. at 203; *Rayonier*, 352 U.S. at 320 ("If the Act is to be altered that is a function for the same body that adopted it.").[1]

[1] Respondents distance themselves from the court of appeals' decision in this case by arguing that in other decisions, the Ninth Circuit has followed *Indian Towing* and *Rayonier* and properly applied state tort law applicable to private persons. Br. in Opp. 8-9 (citing cases). But the Ninth Circuit decisions cited by respondents do not address the issue presented here: whether the United States may be subjected to FTCA liability solely because a state subjects its own governmental entities to liability in like circumstances, regardless of whether private persons would be liable. That is the error the court of appeals made here.

B. The Ninth Circuit's Decision In This Case Conflicts With Decisions Of Other Courts Of Appeals

Respondents' attempt to discount the conflict between the Ninth Circuit and other courts of appeals fares no better.

1. As explained in the petition (Pet. 14-16), the Sixth Circuit has held that state laws pertaining to governmental liability do not apply to an FTCA claim based on the actions of federal mine inspectors. *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); see *Myers* v. *United States*, 17 F.3d 890, 893-894, 901 (6th Cir. 1994). Respondents suggest (Br. in Opp. 12-13) that those decisions are limited to circumstances in which state law relieves governmental entities of tort liability, and leave open the possibility that state law applicable to governmental entities could be applied if it were to *impose* liability. But the language of those decisions provides no basis for respondents' one-sided reading.

In *Raymer*, the court held that "[t]he pertinent inquiry is whether state law makes a *private individual, not the state or other political entity*, liable for an employee's failure to exercise due care under like circumstances." 660 F.2d at 1140 (emphasis added). And in *Myers*, the Sixth Circuit rejected the plaintiffs' reliance on a state case that "recogniz[ed] governmental liability when a governmental actor fails in his governmental duties," expressly concluding that "[t]he extent to which a state provides governmental liability is irrelevant * * * in an action under the FTCA, which only provides for liability 'in the same manner and to the same extent as a *private individual* under like circumstances.'" 17 F.3d at 900 (quoting 28 U.S.C. 2674) (emphasis in court of appeals' decision). The Sixth Circuit's conclusion that the extent of state governmental liability is irrelevant squarely conflicts with the decision below, which held that, far from being irrelevant, principles of governmental liability control if, like

the state case distinguished in *Myers*, they result in an imposition of liability.

In *Ayala* v. *United States*, 49 F.3d 607, 610-614 (1995), the Tenth Circuit likewise held that the United States could not be liable under the FTCA for the alleged negligence of a federal mine inspector, because it concluded that under Colorado law, a private person would not be liable under like circumstances. It is true, as respondents point out (Br. in Opp. 13), that in determining the relevant principles of Colorado tort law, the Tenth Circuit considered (among many other authorities) certain state cases involving governmental actors. 49 F.3d at 612. But the Tenth Circuit specifically "recognize[d] that the FTCA imposes liability 'to the same extent as a private individual under like circumstances,' 28 U.S.C. § 2674," and it looked to cases regarding governmental actors only because they illuminated the duty of parties, private or otherwise, "acting pursuant to a legislatively imposed obligation." *Id.* at 612 n.2. In stark contrast, the Ninth Circuit looked to principles of state governmental liability not to clarify the law that would apply to private persons, but to apply the law applicable to governmental entities *instead of* the law applicable to private persons.

Respondents also seek (Br. in Opp. 14) to minimize the conflict with still other FTCA decisions involving governmental inspections. The fact remains, however, that, insofar as we are aware, only the Ninth Circuit has applied state tort law applicable to governmental entities in such a circumstance. Every other circuit has followed the text of the FTCA and looked to the liability of private persons in like circumstances as the relevant measure of FTCA liability. See Pet. 16-18 (citing cases).

2. Respondents insist (Br. in Opp. 9-11) that no conflict exists between the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819 (1985), and certain rulings of other courts

of appeals. Even if that were the case, it would not diminish the very real conflict between the decision in this case and the decisions of other circuits, both in the specific context of governmental inspections and more broadly. But in fact, the court in *Louie* did not disregard the private-person analogy. In that case, the court determined that no liability should be imposed on the United States for certain activities of law enforcement officers because state law would not have imposed liability on governmental entities. However, the court emphasized that its approach was appropriate only because under Washington law a state or municipal governmental entity is liable to the same extent as a private person. *Id.* at 825. The Court stressed that "[t]his equivalence is important because * * * a finding of immunity for state employees under state law does not determine the scope of the United States' liability under the FTCA." *Ibid.* Although the Fifth Circuit in *Crider* v. *United States*, 885 F.2d 294 (1989), cert. denied, 495 U.S. 956 (1990), purported to follow *Louie*, it did so without undertaking the equivalence determination on which *Louie* itself rested and looked instead to whether a state police officer would owe an actionable special duty to a particular member of the public in like circumstances. *Id.* at 296-298.[2]

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[2] Contrary to respondents' suggestion (Br. in Opp. 1, 9-10), the United States has repeatedly made clear in the Ninth Circuit and in other filings that it does not believe that the existence of a duty on the part of an employee of the United States can be determined by reference to duties imposed on a public officer without reference to a private-person analog. For example, in *Doggett* v. *United States*, 875 F.2d 684 (9th Cir. 1989), the United States filed an unsuccessful petition for rehearing en banc, arguing that the court should not determine the liability of federal employees by reference to the liability imposed on state and local employees, but should look to the closest private-person analog. Gov't Pet. for Reh'g at 5-14, *Doggett*, *supra* (No. 86-6019). In *Anderson* v. *United States*, 55 F.3d 1379 (9th Cir. 1995), the government did not, as respondents suggest (Br. in Opp. 8 n.1), argue that it was subject to immunity for firefighting activities; it argued that a private person would not

Furthermore, as we indicated in the certiorari petition (Pet. 18 n.7), cases involving law enforcement officers may raise distinct issues not presented here. This case involves inspections, which have a ready private analog: the liability of private workplace inspectors. See, *e.g.*, *Easter* v. *Percy*, 810 P.2d 1053 (Ariz. Ct. App. 1991); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986). Indeed other courts of appeals have applied a rule of liability for private persons, the Good Samaritan doctrine, in resolving such cases. By contrast, in many cases involving actions by police officers, there may be no "private person" analog. For these reasons, and those discussed in the petition (Pet. 18 n.7), the law enforcement cases cited by respondents (Br. in Opp. 9-11) do not bear directly on the question presented here: whether the FTCA measures the existence of an actionable duty by reference to state law applicable to private persons in like circumstances or, as the court of appeals held, to state law applicable to state or municipal entities in like circumstances. But if we assume, arguendo, that those cases are directly relevant here, they would only underscore the extent to which guidance from this Court is needed.

3. Respondents also fail in their effort (Br. in Opp. 15) to minimize the extent to which the decision below—by making the liability of the United States turn on violations of federal law, not state law—conflicts with those of other courts of appeals. See Pet. 19-20. The court of appeals concluded that

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be held liable under state law because of a state-law rule providing that no duty should be imposed on private persons performing functions similar to those of public actors where the legislature has made a policy determination to shield public actors from liability. See *id.* at 1382. And in *Crider*, the government argued that the Fifth Circuit should apply the law as it relates to private parties, but explained that it would prevail even if the court applied the state law of governmental liability. Gov't C.A. Br. at 26-31, *Crider*, *supra* (No. 88-2944).

liability should be determined by reference to Ariz. Rev. Stat. § 12-820 historical and statutory note (2003) (quoting 1984 Ariz. Sess. Laws ch. 285, § 1, at 1091-1092), which declares it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." Pet. App. 6a & n.1 (citing Ariz. Rev. Stat. §§ 12-820 to 12-826 (1984)). As conceived by the court of appeals, the relevant analogy is to the State's decision to make itself liable for its employees' violations of its *own* enactments, and the result is to hold the United States liable in tort for violations by federal employees of *federal* statutes or regulations. See Pet. App. 6a. Such a result is wholly contrary to the firmly-established rule that the FTCA does not apply "where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs." *Johnson* v. *Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (internal quotation marks omitted). Although, as respondents assert (Br. in Opp. 15), the Ninth Circuit has recited this principle in the past, its decision here flouts that principle and is thus fundamentally irreconcilable with a broad line of precedent.

C. The Question Presented Warrants Immediate Review

There is no merit to respondents' suggestion (Br. in Opp. 15-16) that this case lacks sufficient importance to warrant this Court's review. The question presented goes to the heart of the meaning and proper application of the FTCA. By ignoring Congress's express direction that the United States' liability should be based on the liability of private individuals under state law, the Ninth Circuit has fundamentally altered the nature and scope of Congress's waiver of sovereign immunity. The Ninth Circuit's decision effectively rewrites the FTCA and threatens to transform every federal law, regulation, and policy manual into a potential source of

tort liability, with no regard to whether a "private individual under like circumstances," 28 U.S.C. 2674, would have any actionable duty.

While it is true (Br. in Opp. 16-18) that the decision below is interlocutory, now is the time to review the question presented. The court of appeals defined the scope of the inquiry on remand: whether a governmental entity under like circumstances would be liable under Arizona law. The court specifically rejected the application of a "private-sector analogue." Pet. App. 5a-6a. Thus, the district court will have no warrant to consider whether the government should be held liable under a "Good Samaritan" theory. And, in any event, the Ninth Circuit's decision in this case establishes circuit precedent that will control other FTCA cases in that circuit and that conflicts with decisions of this Court and of other courts of appeals. The Court has not hesitated to review important questions about the scope of the FTCA when presented by cases in an interlocutory posture. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315 (1991); *United States* v. *Muniz*, 374 U.S. 150 (1963). Review by this Court therefore is warranted.

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For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2005